UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LINDA G. ALFORD, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DA07529010114 DATE: MAR 13 1991

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

Odell Taylor, Esquire, Texarkana, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision that dismissed her petition for appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition under 5 U.S.C. § 7701(e), VACATE the initial decision, and REMAND the case to the Board's Dallas Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

On December 6, 1989,[1] the appellant filed a petition for appeal with the Board's Dallas Regional Office, asserting that she had been "constructively reduced in grade and pay," and that she had not been converted to a career-conditional appointment. As the basis for her assertion, she alleged that the Army Materiel Command (AMC) cancelled her promotion from Personnel Management Specialist, GS-7, to Personnel Management Specialist, GS-9, at the Red River Army Depot (RRAD) in Texarkana, Texas. She asserted that the promotion and her conversion to career-conditional appointment were processed in October 1989 by RRAD. The appellant requested a hearing on her appeal. See Initial Appeal File (IAF), Tab 1.

In response to the administrative judge's order to file evidence and argument showing that the action was within the Board's jurisdiction, the appellant made the following assertions. On August 26, 1989, the Director of Personnel and Community Activities at RRAD, David P. Vershaw, prepared an SF-52 promoting her to Personnel Management Specialist, GS-9, and to career-conditional status effective October 22, 1989. The SF-52 did not reach the Technical Services Branch for processing until the end of October. About October 26, 1989, the SF-52 was processed and the codes were entered to prepare an SF-50; however, due to a clerical error, the request for an

[1] The Board considers a petition filed on its postmark date, if mailed, or on the date of receipt by the Board, if hand-delivered. *Beer v. Department of the Army*, 2 M.S.P.R. 53, 56 (1980).

SF-50 was rejected. During this time, Mr. Vershaw was contacted by Roberta Tarbert of the AMC, who asked him to hold the processing of the appellant's promotion, even though it was already effective. Mr. Vershaw then attempted to illegally revoke the promotion. To support her allegation of Board jurisdiction, the appellant submitted legal arguments and copies of the SF-52, a logbook page showing her promotion effective October 22, 1989, and Mr. Vershaw's October 30, 1989 note asking that a "hold" be placed on the personnel action pursuant to his conversation with Ms. Tarbert. IAF, Tab 3.

Subsequently, the appellant submitted additional arguments, her affidavit, an amendment to her personnel file, and an affidavit from Kenneth McCloskey, her second-line supervisor. She contended that she had been promoted on October 22, 1989, and that she had performed the GS-9 duties as of that date. Thus, the October 30, 1989 request to "hold" her promotion constituted a demotion from which she was entitled to appeal to the Board. IAF, Tab 8.

The agency responded with argument and evidence that the appellant had not been promoted. Specifically, it submitted affidavits from Ms. Tarbert and Melinda Kaye Darby, also from the AMC, averring that their organization, not the RRAD, had the authority to promote the appellant. IAF, Tabs 5, 9, and 10.

In her initial decision, the administrative judge first found that under *Miyai v. Department of Transportation*, 32 M.S.P.R. 15, 20 (1986), the appellant's previous filing of a

grievance on this matter did not preclude her from appealing to the Board because the agency had not given the appellant notice of appeal rights. She also found that, if the appellant had been promoted, the appellant's status as a non-preference eligible in an excepted service position would not defeat Board jurisdiction. In this regard, she found that the appellant's conversion to a career-conditional position would give her competitive status under 5 C.F.R. § 315.701(e), and since she had previously completed a probationary period, the appellant would be entitled to appeal a reduction in grade to the Board. Initial Decision at 3 n.3.

The administrative judge concluded, however, that the Board lacked jurisdiction over the appellant's appeal because the appellant had failed to show that Mr. Vershaw had the authority to promote her or that she had actually been promoted and occupied the higher-graded position. Specifically, she cited Ms. Darby's and Ms. Tarbert's statements that only AMC had the authority to promote the appellant, and found that the appellant had not introduced any statements from Mr. Vershaw or one of his superiors reflecting that Mr. Vershaw had the authority to promote her. In addition, the administrative judge found that the appellant failed to produce evidence that she had been legally promoted and actually occupied the higher-graded position. Thus, the administrative judge found that the appellant was not entitled to appeal to the Board.

The administrative judge did not afford the appellant her requested hearing before issuing the initial decision. Citing *Frazier v. Department of Transportation*, 26 M.S.P.R. 190, 191-92 (1985), the administrative judge found that the appellant was not entitled to a hearing because she raised "mere conclusory allegations" to support her jurisdictional argument.

ANALYSIS

In her petition for review, the appellant asserts, among other things, that the administrative judge erred in denying her request for a hearing. We agree. An appellant is not required to prove Board jurisdiction to entitle her to a hearing; rather, she need only make a non-frivolous allegation that the Board has jurisdiction over her appeal. *See, e.g., Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 642-43 (Fed. Cir. 1985); *Jones v. Department of the Army*, 41 M.S.P.R. 310, 312 (1989).

We find that the appellant has made such an allegation. As was previously described, the appellant submitted not only legal argument, but documentary evidence to support her claim that she had been promoted. *See* IAF, Tabs 3 and 8. Although the administrative judge stated that the appellant had failed to allege sufficient facts to support her claim, she proceeded to consider the evidence submitted by both parties and to make factual findings concerning the weight of this evidence. *See* Initial Decision at 3-6. These determinations should not have

been made until after a hearing. *See, e.g., Gleaves v. Department of the Navy*, 36 M.S.P.R. 558, 560 (1988).

Furthermore, we find that the case cited by the administrative judge to deny the appellant a hearing actually supports the appellant's request for a hearing. In *Frazier*, 26 M.S.P.R. at 191-92, the Board found that the administrative judge erred in denying the appellant a hearing based on his assertion that his agency had constructively reduced him in grade. The Board specifically held that where an employee presents a non-frivolous argument that his employing agency constructively reduced him in grade, and his argument is based on more than mere conclusory allegations, he is entitled to a hearing on the allegation. The decision in *Frazier* suggests that that appellant did not present comparable documentary evidence to that provided by the appellant in this case, and thus that this is an even stronger case for granting the appellant a hearing on the question of jurisdiction.

We find that it is also necessary to remand this case because the administrative judge did not explain her reliance on 5 C.F.R. § 315.701(e) or support her statement that the appellant had completed a probationary period for the GS-9 position in finding that the appellant would have appeal rights to the Board if she had been promoted. Specifically, she did not make a finding that the appellant met the definition of employee set forth at 5 U.S.C. § 7511(a)(1). An appellant must be an employee to have a right to appeal an

action taken under 5 U.S.C. Chapter 75 to the Board. 5 U.S.C. § 7513(d).

Accordingly, we remand this case to the regional office for a hearing and the issuance of a new initial decision.[2] If the administrative judge finds that the Board has jurisdiction over the appellant's case, she should then determine the timeliness of the appellant's petition for appeal. If the appeal is within the Board's jurisdiction and timely, the administrative judge should proceed to decide the merits of the appellant's appeal.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board
Washington, D.C.

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[2] Because of this, we find it unnecessary to address the other arguments presented in the appellant's petition for review.